

1 STATE OF CALIFORNIA
2 DEPARTMENT OF INDUSTRIAL RELATIONS
3

4 DECISION ON ADMINISTRATIVE APPEAL
5 IN RE: PUBLIC WORKS CASE NO. 99-032
6
7 SAN DIEGO CITY SCHOOLS
8 CONSTRUCTION OF PORTABLE CLASSROOMS
9

10 I. Introduction and Procedural History

11 On November 10, 1999, in response to a request by Arthur S.
12 Lujan, then Business Manager, Building and Construction Trades
13 Council, San Diego County ("Council"), the Director of the
14 Department of Industrial Relations ("Director") issued a public
15 works coverage determination finding the construction of portable
16 classrooms by Echo Pacific Construction ("Echo") for the San
17 Diego Unified School District ("District") to be a public work
18 under the California prevailing wage law. On January 5, 2000,
19 the District filed a late appeal of the Director's determination.
20 That appeal was not properly served on other interested parties
21 as required by Title 8 California Code of Regulations ("CCR")
22 section 16002.5. On January 27, 2000, the Department of
23 Industrial Relations, Office of the Director Legal Unit, served
24 the Council with a copy of the appeal, advised the District that
25 it had made such service and invited the Council to file a
26 response. As of this date, the Council has not made a further
27 submission. The Carpenters Contractors Cooperation Committee
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1 ("CCCC"), as an interested party under 8 CCR section 16000,
2 submitted written argument in favor of the Director's
3 determination.

4 5 II. Issues and Conclusions on Appeal

6 The District contends that the initial determination was
7 incorrect for two reasons. First, it asserts that the
8 Department's reliance on the decision in *O.G. Sansone v.*
9 *Department of Transportation* (1976) 55 Cal.App.3d 434, 127
10 Cal.Rptr.799, is misplaced because the central issue in this case
11 is whether the project is a public work. Second, the District
12 argues that, under the reasoning of *Steelgard, Inc. v. Jannsen*
13 (1985) 171 Cal.App.3d 79, 217 Cal.Rptr.152, the purchase of
14 portable classrooms is the procurement of materials or supplies
15 and not a public works project for construction, alteration,
16 demolition or repair work. In its submission, the CCCC asserts
17 that the appeal should be dismissed both because of the
18 District's failure to timely file its appeal and because it fails
19 to state the full factual and legal grounds upon which the
20 determination is appealed.

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22 After a review of the District's appeal and the CCCC's
23 argument, the Director entertains the appeal because it involves
24 an important policy issue related to the interpretation of the
25 Labor Code in the context of the facts of this case. I find that
26 the District has entered into a public works contract for the
27 construction of portable classrooms and that its contractors and
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1 their subcontractors, if any, are obligated to pay their workers
2 the appropriate prevailing wage.

4 III. Relevant Facts

5 The following facts concerning the project appear to be
6 undisputed by the parties to this appeal. The District entered
7 into a contract with D. M. Erickson Construction Company¹ for the
8 construction and delivery of 200 portable classrooms. The
9 contract specifically requires that the contractor provide "all
10 labor, materials, tools, equipment and services including
11 necessary tools, expendable equipment, and all utility and
12 transportation services required to complete in a workman-like
13 manner all the work required in connection with the project known
14 as 'Construction of Portable Contract No. 79'." The contract
15 price for the purchase of the 200 portable classrooms is
16 \$1,224,000. Echo is performing the construction of the portable
17 classrooms, which are not prefabricated at a permanent factory
18 site. The portable classrooms are being assembled on privately-
19 owned land leased by Echo as a construction and storage yard for
20 the portable classrooms as they are prepared for delivery to the
21 District. According to District personnel, the District has a
22 contract with an outside vendor to move the portable classrooms
23 from the yard used by Echo to the various school locations where
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28 ¹ Echo is the successor in interest to D.M. Erickson Construction Company.

1 the portable classrooms are sited.² The classrooms are delivered
2 to various school sites throughout the District where they are
3 installed by District personnel who do the final hook-up work for
4 the HVAC, electrical, and plumbing systems to put the classrooms
5 into service.

6 The District filed a Notice of Completion ("Notice") on
7 September 15, 1999, attesting that it had accepted the work of
8 the contractor for the "construction of 200 portable classroom
9 buildings (constructed at) stockpile location: 408 Hollister St.,
10 San Diego, California 92154." The Notice is for a public works
11 project and is issued and recorded pursuant to the provisions of
12 sections 3086, 3093, and 3184 of the California Civil Code. Item
13 5 of the Notice identifies the "original contractor" as Echo
14 Pacific Construction, Inc. The Notice is signed by Thomas J.
15 Calhoun, Director, Facilities Development Department, Business
16 Services Division, San Diego Unified School District. It is
17 notarized and has been officially accepted by the County
18 Recorder's Office for the County of San Diego.

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27 ² While not a subject of the coverage request, it should be noted that
28 anyone employed (other than District employees) to move the portable
classrooms from the dedicated yard to the various school sites is also
entitled to prevailing wages. See the discussion of Sansone, infra.

1 IV. Discussion

2 1. The Appeal's Untimeliness and Service Irregularity
3 Will Not Preclude a Determination on the Merits.

4 The initial determination was served on the interested
5 parties on November 10, 1999. The District's appeal (or request
6 for reconsideration) was served on the Director on January 5,
7 2000. Under 8 C.C.R. 16002.5, an appeal from a determination of
8 the Director must be filed "within 30 days of the issuance of the
9 coverage." It must be served on the awarding body and any other
10 interested parties. In this case the District failed to file the
11 appeal within 30 days and it did not serve the Council, which was
12 sent a copy of the signed determination letter and which is
13 clearly an interested party within the definition of that term
14 contained in 8 Cal.Code Regs. 16000.³

15 Clearly, the District did not serve its appeal within the 30-
16 day requirement nor did it properly serve all parties. The
17 Director's Legal Unit cured the service irregularity when it
18 served Council with the appeal and provided it time within which
19 to respond.
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22 ³ Interested Party. When used with reference to a particular prevailing
23 wage determination made by the Director, includes:

24 (1) Any contractor or subcontractor, or any organization, association, or
25 other representative of any contractor or subcontractor likely to bid on or to
26 perform a contract for public work which is subject to the particular
27 prevailing wage determinations, and/or

28 (2) Any worker in the particular craft, classification, or type of work,
who may be employed on a public work project subject to the particular
prevailing wage determination, or any labor organization or other
representative of such a person, including the recognized collective
bargaining representative for the particular craft, classification, or type of
work; and/or

(3) Any awarding body or association or other representative of awarding
bodies concerned with the administration of a public works contract or proposed
contract, which is subject to the particular prevailing wage determination.

1 In addition, 8 CCR 16002.5(b) requires that a notice of
2 appeal of a public works coverage determination "shall state the
3 full factual and legal grounds upon which the determination is
4 appealed..." CCCC claims that the appeal fails to comport with
5 this requirement. The appeal sets forth sufficient facts and
6 legal arguments to allow the Director and the CCCC to comprehend
7 the District's position. Generally, a court will not dismiss an
8 appeal solely because it is procedurally deficient if there is
9 sufficient information to determine the nature of the complaint
10 and the requested relief and the deficiency may be readily cured.
11 *Drake v. Davis* (1946) 73 Cal.App.2d Supp. 1000, 1003, 167 P.2d
12 560.
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14 Finally, the initial determination addresses important
15 policy issues interpreting provisions of the Labor Code as they
16 apply to this project. For these reasons, the Director
17 entertains the appeal.
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19 2. The Construction of 200 Portable Classrooms at a Dedicated
20 Yard Leased Solely for the Project is Construction Paid For
21 With Public Funds Under 1720(a) and not the Purchase of
22 Material or Supplies.

23 The general question presented is whether, under applicable
24 statutory and case law, the workers of Echo are entitled to be
25 paid prevailing wages on the project because they are employees
26 of a contractor engaged in a public works project. The specific
27 issue raised by this appeal is whether the construction of 200
28 portable classrooms on a specifically dedicated site amounts to a
"public works" as that term is used in the Labor Code and whether

1 it is a "project" as that term is used in the Public Contracts
2 Code section 10105,⁴ or is merely the purchase of supplies or
3 materials as those terms are used in Public Contracts Code
4 section 10101⁵ and, therefore, governed under Education Code
5 sections 17785 et.seq. and 39190 et.seq.

6 The initial determination found that this case was governed
7 by the reasoning in *O.G. Sansone v. Department of Transportation*
8 (1976) 55 Cal.App.3d 434, 127 Cal.Rptr.799. In *Sansone*, a
9 trucking company hauled sub-base material to a state highway
10 construction project from locations adjacent to and established
11 exclusively for the highway project. The material was purchased
12 by a third party subcontractor who then contracted with a
13 trucking firm to haul the sub-base to the project. The material
14 was dumped directly onto a roadbed, where workers on the project
15 incorporated the material into the roadbed. The trucking company
16 in *Sansone* was found to be a subcontractor for two principal
17 reasons. First, the materials it delivered were acquired from
18 third party locations adjacent to and established exclusively for
19 the project site, and, second, the trucking company was hired by
20 the prime contractor to perform an integral part of the prime
21 contractor's obligations under the prime contract.
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24 ⁴ Public Contract Code section 10105 states in relevant part: "As used
25 in this part, "project" includes the erection, construction, alteration,
26 repair or improvement of any state structure, building, road, or other state
improvement of any kind."

⁵ Public Contract Code section 10101 states in relevant part: "Contracts
27 for the purchase of supplies or materials which are purchased pursuant to
Chapter 2 (commencing with Section 10290), Part 2, Division 2, of the Public
28 Contract Code, are not subject to this part, even though the seller is
required to perform some incidental work or service in connection with the
delivery of the material or supplies."

1 In analyzing whether the trucking company was a
2 subcontractor, the Court adopted the United States Secretary of
3 Labor's administrative interpretations of the Davis-Bacon Act's
4 exclusion of material suppliers from statutory coverage. The
5 Court set forth three principal criteria for the denomination of
6 material supplier. First, a material supplier must be in the
7 business of selling supplies to the general public. Second, the
8 plant from which the material is obtained must not be established
9 specially for the particular contract. Third, the plant may not
10 be located at the site of the work.

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12 In this case, it is undisputed that the employees are
13 working for a general contractor hired to assemble the portable
14 classrooms before they are moved to specific school sites for
15 final installation by district personnel. They are not employees
16 of a material supplier. It is also clear that the workers
17 constructing the portable classrooms are working at a site leased
18 by Echo solely for the assembly of the classrooms. Finally, it
19 is undisputed that the leased site closed upon completion of the
20 construction work. Therefore, under *Sansone*, the workers
21 employed at the site dedicated to the construction of the
22 portable classrooms are entitled to be paid prevailing wages.

23 The District contends that *Steelgard* supports the conclusion
24 that its purchase of portable classrooms is simply the
25 procurement of materials and supplies, and not a public works
26 project. In *Steelgard*, the issue was whether the California
27 Department of General Services had to competitively bid work in
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1 implementing the Emergency School Classroom Law of 1979 ("ESCL")
2 under the State Contract Act or whether the acquisition of
3 portable classrooms was covered under the ESCL's provisions for
4 the procurement of portable classrooms. In *Steelgard*, the
5 Department of General Services put out to bid a series of
6 portable classroom projects under the ESCL as the procurement of
7 materials or supplies, and not under the more formal bidding
8 requirements of the State Contract Act. A losing bidder filed a
9 writ of mandate seeking to have the Department of General
10 Services reopen bidding, contending that the contract should have
11 been competitively bid under the State Contract Act. The Court
12 observed that the State Contract Act is more burdensome and less
13 flexible than the ESCL's provisions. The Court also noted that,
14 unlike the standard construction contracts to which the State
15 Contract Act normally applies, the on-site work necessary to
16 install a portable classroom was approximately \$400-500 while the
17 total purchase price of each classroom was \$20,000. *Id.*, pg. 89.
18 The Court reasoned that the installation of a portable classroom,
19 which it described as an impermanent structure, was only
20 incidental (as that term is used in Public Contract Code section
21 10101) to the purchase of a finished product, the portable
22 classroom. In reaching its conclusion, the Court stressed that
23 one of the reasons that the State Contract Act did not apply is
24 that the buildings were "prefabricated in factories," rather than
25 constructed on the site where they will be utilized. The Court
26 further stated that "only a small portion of the time, cost, and
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1 labor involves outside installation. By both the statutory
2 definition and in reality, the buildings are easily relocatable,
3 installed on wood rather than permanent foundations." Id., pg.
4 90.

5 In contrast to the facts of *Steelgard*, evidence produced by
6 the Council shows that the classrooms are actually constructed on
7 the specifically dedicated site where there is a great deal of
8 construction work because the buildings are assembled from the
9 ground up. Further, the buildings are constructed by a licensed
10 contractor and are not wholly manufactured at a permanent plant.
11 This is exactly the situation discussed in *Sansone*, supra. The
12 work is done in the furtherance of a public works project and it
13 takes place at a location site set up solely to service the
14 public work. Indeed, the contract itself shows that the first
15 and largest component listed under the scope of the work is the
16 provision of all labor necessary to perform the construction.⁶
17 While relying on *Steelgard*, supra, the District does not dispute
18 that the actual construction takes place at a dedicated facility
19 which is not the manufacturer's property and the buildings are
20 not prefabricated in factories as in *Steelgard*. In addition, it
21 is apparent that the construction here is not of the type
22 discussed in Education Code section 39190 (now renumbered as
23 section 17350) which defines "a 'factory-built school' building
24 as any building designed or intended for use as a school building
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28 ⁶ The actual installation work is done by district personnel or force
account workers who are permanent public employees and are not entitled to
prevailing wages. *Bishop v. San Jose* (199) 1 Cal.3d 56, 81 Cal.Rptr. 465.

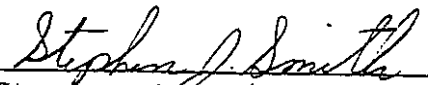
1 which is either wholly manufactured or in substantial part
2 manufactured at an off-site location . . . to be assembled or
3 erected on a school site." Quite the opposite is true here. The
4 vast majority of the construction takes place at the dedicated
5 yard facility where parts are delivered and assembled. This must
6 be contrasted to the *Steelgard* case which, based on the evidence,
7 found that only a very small portion of the contract price had to
8 do with the installation of pre-manufactured classrooms. Here,
9 there is certainly more than an incidental amount of work being
10 performed to construct the classrooms and certainly more than an
11 incidental percentage of the contract price is to pay for that
12 construction.
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14 Finally, it should be noted that *Steelgard* does not address
15 the question whether the procurement of the classrooms was a
16 public work. Rather, it addresses whether the project could be
17 procured under the provisions of the Education and Government
18 Codes related to the acquisition of portable school buildings
19 rather than competitively bid under the more stringent
20 requirements of the State Contract Act related to construction of
21 public facilities. The Court found that, based on the particular
22 facts of the case, the Department of General Services did not
23 have to put the project out to bid under the State Contract Act.
24 (*Id.* at p. 91.) This is quite different than the issue presented
25 by this appeal—whether the construction work is a public works.
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1 V. Conclusion

2 Based on the foregoing, I deny the District's appeal and
3 sustain the original determination that the work in question is a
4 public works for which prevailing wages must be paid.
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8 DATED: 6/23/00


9 Stephen J. Smith
10 Director
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